APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED OCTOBER 20, 1997

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 97-1253

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff, Appellant,

v.

FALLON COMMUNITY HEALTH PLAN, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nathaniel M. Gorton, *U.S. District Judge*]

Before

Boudin, *Circuit Judge,*

Hill,* *Senior Circuit Judge,*

and Pollak,** *Senior District Judge.*

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* Of the Eleventh Circuit, sitting by designation.

** Of the Eastern District of Pennsylvania, sitting by designation.

Appendix A

* * *

October 20, 1997

BOUDIN, *Circuit Judge.* Ronald Turner, on behalf of himself and as administrator of the estate of his deceased wife, Charlotte Turner, brought this suit in Massachusetts state court against Fallon Community Health Plan, Inc. ("Fallon"). The gravamen was Fallon's refusal to provide coverage for a treatment regime proposed by Charlotte Turner and her doctor to address her mestastasized breast cancer. After the case was removed to federal district court, the district court granted summary judgment for Fallon, and Ronald Turner appealed.

The pertinent facts are largely undisputed. In 1991, Charlotte Turner was diagnosed with breast cancer. The disease was at first treated by surgery, chemotherapy and radiation. In May 1993, tests showed that the cancer had mestastasized, was beyond control by conventional therapies, and threatened Charlotte Turner with death within 12 to 18 months. Ronald Turner was employed by General Motors, and Charlotte Turner was covered by the health coverage that Fallon provided for family members of General Motors employees.

Fallon is a health maintenance organization that provides or reimburses health care for its members. Its "Member Handbook," which is presented as "part of [the member's] contract with [Fallon]," describes in detail the various medical costs that Fallon will cover for beneficiaries. Among the express *exclusions* set forth in the handbook was "bone marrow transplant for treatment of solid tumors. . . ." Dr. Ronald Hochman, Charlotte Turner's oncologist at Fallon, nevertheless concluded that Charlotte Turner's only hope was an autologous

bone marrow transplant, a procedure by which the patient's own bone marrow is extracted, stored and then reintroduced after the patient receives high dosage chemotherapy. Marrow is the source of vital white blood cells needed to fight infection and without the transplant procedure, the high dosage chemotherapy would impair the bone marrow's ability to continue to produce white blood cells.

In May 1993, Fallon approved Charlotte Turner's request that she be evaluated by Dana Farber Cancer Institute for possible participation in its bone marrow transplant program. Fallon continued to assert that a bone marrow transplant was not a covered procedure for solid tumor cancer but said that if the treatment was recommended by Dana Farber, the request for coverage would be reviewed further by Fallon. Ultimately, Dana Farber concluded that Charlotte Turner was not eligible for the Dana Farber protocol because cancer cells had already been detected in Charlotte Turner's bone marrow.

Charlotte Turner then asked Fallon to cover her examination for eligibility to enter a program being conducted by the Duke University Medical Center. In this program, Duke not only removed bone marrow for reimplantation, in aid of high dosage chemotherapy, but also employed procedures to attempt to "purge" the marrow of its cancer cells. Fallon declined to cover the cost of a "third opinion." Charlotte Turner then had herself examined by doctors at the Duke program who concluded that she might be eligible to participate, subject to further testing. The cost of her participation in the program was estimated at $100,000.

In July 1993, Charlotte Turner and Dr. Hochman asked Fallon to pay for her inclusion in the Duke program. In August

1993, Fallon's Transplant Committee met to consider Charlotte Turner's request and the broader question whether coverage should be extended, on a case-by-case basis, to bone marrow transplants to treat solid tumor cancers either under the Dana Farber protocol or the Duke program or both. Dr. Hochman supported Charlotte Turner's application for coverage to the Duke program.

The Transplant Committee decided that, despite its handbook exclusion, it would in the future extend coverage for the Dana Farber protocol if it concluded in the particular case that the treatment was critically necessary and showed a strong likelihood of success. If concluded, however, that the Duke program had as yet produced no adequate data suggesting a likelihood of success, and therefore declined to extend coverage for the Duke program. At Charlotte Turner's request, Fallon's Grievance Committee held a hearing in September 1993 to review the decision of the Transplant Committee, but in early October 1993, the Grievance Committee upheld the denial of coverage for the Duke program.

Immediately after the Grievance Committee's decision in October 1993, Charlotte Turner underwent conventional low-dosage chemotherapy without bone marrow transplantation. She died on August 17, 1994. Ronald Turner then brought suit in the Massachusetts superior court against Fallon charging it with breach of contract, wrongful death and other state-law claims. Fallon removed the case to federal district court on the ground that state-law claims were preempted under ERISA — the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq. See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66-67 (1987).

Ronald Turner responded by amending his complaint to delete the state claims and to substitute a claim under ERISA. The amended single-count complaint charged that Fallon's denial of coverage for the Duke program "denied Charlotte of the rights and benefits due under the policy and was arbitrary, illegal, capricious, unreasonable and not made in good faith and was a breach of [Fallon's] fiduciary duty which it owed to Charlotte." The complaint sought damages and a trial by jury.

In March 1996, Fallon moved for summary judgment. Ronald Turner opposed the motion and asked for further discovery, which Fallon in turn opposed. The district court then ruled that a civil ERISA action could be brought by a plan beneficiary only (in the words of the statute) "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Concluding that Ronald Turner's damage action was not authorized by ERISA, the court ruled that the case had to be dismissed and that further discovery would be futile.

Ronald Turner then sought reconsideration and also sought to amend the complaint to reassert the previously withdrawn state-law claims. He argued that if ERISA provided no federal remedy, it ought not be read to preempt his state-law claims. Alternatively, he urged that if ERISA preempted the state-law claims, then a federal remedy ought to be inferred or created by the court to permit damages for wrongful withholding of treatment under the employee benefits plan. The district court wrote a thoughtful opinion denying these requests.

On this appeal, we begin with Ronald Turner's claim that ERISA should be read to confer a claim for damages where, as

charged in the amended complaint, a beneficiary of the plan has been denied "the rights and benefits due under the policy" or has suffered "a breach of . . . fiduciary duty" in the withholding of those benefits. ERISA is a comprehensive federal statute that governs not only pension plans but also nonpension benefit plans, including the General Motors health benefits plan at issue in this case.

ERISA sets forth a half dozen civil enforcement provisions. 29 U.S.C. § 1132(a). Under the first such provision, a beneficiary may bring a federal civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Id.* § 1132(a)(1)(B). The relief expressly provided is to secure benefits under the plan rather than damages for a breach of the plan. Here, treatment coverage is no longer of any significance.

The other pertinent remedial provision authorizes civil action by a beneficiary "to obtain other appropriate equitable relief" to address violations of ERISA or to enforce the plan. 29 U.S.C. § 1132(a)(3)(B). The Supreme Court recently held in *Varity Corp. v. Howe,* 116 S. Ct. 1065 (1996), that this provision may permit equitable relief against a plan administrator for breaches of the fiduciary duty imposed on such administrators by ERISA. *See id.* at 1075-79. But this provision is expressly limited to providing equitable relief, and equitable relief is not being sought in this case.

Ronald Turner points to no other specific remedial provision in ERISA that might arguably be brought into play in this case. In fact, the Supreme Court has stressed that ERISA does not create compensatory or punitive damage remedies where an

administrator of a plan fails to provide the benefits due under that plan. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985); *see also Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988). This is not a minor technicality: damage awards may increase effective coverage but may also add significantly to the costs of coverage.

The lack of an express damage remedy under ERISA does not necessarily end the story. The federal courts have regularly inferred or created remedies in the shadow of federal statutes, although the practice has waned somewhat in recent years. *See, e.g., Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981). But the Supreme Court has adamantly ruled that ERISA's express remedies are a signal to courts not to create additional remedies of their own. *Russell*, 473 U.S. at 145-48. *See also Reich v. Rowe*, 20 F.3d 25, 31-33 (1st Cir. 1994); *Drinkwater*, 846 F.2d at 824.

In the alternative, Ronald Turner argues that ERISA, if it provides no damage remedy of its own either expressly or by implication, should at least not be taken to preclude existing state remedies. Absent preemption, a health benefits plan like Fallon's could certainly be treated as a contract enforceable under state law and subject to the usual contractual remedies, including compensatory damages. Depending on the jurisdiction, state law might provide even more substantial relief, including punitive damages.

ERISA contains a vague but broadly worded preemption provision. With exceptions not relevant here, it provides that the pertinent subchapter of ERISA shall supersede any and all "State laws insofar as they may now or hereafter relate to any

employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). However this general language might otherwise have been read, the Supreme Court has construed it to preclude state claims to enforce rights under an ERISA plan or obtain damages for the wrongful withholding of those rights, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52-57 (1987), and this construction has been repeatedly followed.[1]

The Supreme Court has recently set some new limits on preemption by holding that certain state laws were not sufficiently "related" to ERISA to deserve preemption. *See De Buono v. NYSA-ILA Medical & Clinical Servs. Fund*, 117 S. Ct. 1747, 1752-53 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 117 S. Ct. 832, 842 (1997). But neither of these cases involved a state's attempt to provide state remedies for what is in essence a plan administrator's refusal to pay allegedly promised benefits. It would be difficult to think of a state law that "relates" more closely to an employee benefit plan than one that affords remedies for the breach of obligations under that plan.

Ronald Turner more or less admits that existing Supreme Court precedent is against him, both as to an implicit federal cause of action and the preemption of state claims. But he says that it is grossly unjust to deny any remedy, either state or federal, to compensate in damages the victim, family or estate of one who has been wrongfully denied promised healthcare benefits.

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1. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990); *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 794 (1st Cir. 1995); *Rosario-Cordero v. Crowley Towing & Transp. Co.*, 46 F.3d 120, 126 (1st Cir. 1995); *Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 964 n.8 (1st Cir. 1991); *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir.), *cert. denied*, 498 U.S. 1013 (1990).

Further, he argues that this gap provides a cruel incentive for plan administrators to withhold treatment or delay it as long as possible, since the claim for benefits may be mooted by the beneficiary's death.

There are in realty two quite different problems of law and policy entangled in this argument. The one that Ronald Turner seeks to present is the case of a beneficiary wrongfully denied promised benefits. There is reason to doubt that that is the true problem in *this* case (a point to which we will return), but such cases are easy to imagine and certain to occur. Compensatory damages are a conventional and potent remedy that might indeed deter misconduct and mitigate loss, although the cost of the plan would also be increased.

On the other hand, some might think it perverse to dwell on damage remedies, which apply where the patient has died or already suffered injury, and might urge instead that courts improve access to *equitable* relief. This remedy, already available under ERISA, can address a wrongful denial of benefits while the patient is still alive and unharmed. Although Ronald Turner says that such judicial relief is readily frustrated by exhaustion of remedies rules, a failure to exhaust is easily forgiven for good reason, and no reason is better than an imminent threat to life or health. *E.g., Portela-Gonzalez v. Secretary of the Navy,* 109 F.3d 74, 77 (1st Cir. 1997); *see also DePina v. General Dynamics Corp.*, 674 F. Supp. 46, 49 (D. Mass. 1987).

In all events, it is certainly a matter for reasonable debate whether a damage remedy should be added, either by judicial interpolation or by Congress. But only the Supreme Court could alter the existing case law that precludes such a remedy. And whether or not Congress ever thought about the impact on health

care in particular when it wrote ERISA's remedies and preemption provisions, Congress is well equipped to revisit the issue and alter the statutory language that now stands as a bar.

Although the question of a damages remedy is an important one, it likely has no practical importance in this case. The central obligation of Fallon to Charlotte Turner is fixed by the terms of the health plan, and it would be difficult to find an exclusion more unequivocal than Fallon's written exclusion of bone marrow transplant treatment for solid tumors. Even if Fallon were treated as having modified the contract in August 1997, the modification seemingly extended only to the Dana Farber program, for which Charlotte Turner was admittedly ineligible. Thus, anything akin to a contract claim looks almost hopeless on this record.[2]

Ronald Turner's position is not improved by invoking fiduciary concepts under ERISA. Beneficiaries may sue a plan for breach of fiduciary duty causing individual harm, but such suits are allowed only for equitable relief and, even then, only where Congress has failed to provide more specific relief. *See Varity Corp.*, 116 S. Ct. at 1079. Neither condition is met here since Ronald Turner seeks damages, not equitable relief, and his grievance — a denial of benefits — is specifically addressed by 29 U.S.C. § 1132(a)(1)(B).

Furthermore, Fallon also owes a duty to other plan

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2. Also asserted were state tort claims against Fallon, essentially for negligence in investigating the Duke program and for infliction of emotional distress. It is difficult to see how denial of an expressly excluded treatment could support a negligence claim; and assuming that Fallon could legally withhold treatment, any liability for inflicting emotional distress seems unlikely.

participants who have a continuing interest in the solvency of the plan and the expenditure of its funds for *covered* medical procedures. *See Varity Corp.*, 116 S. Ct. at 1078-79. The notion that there is a fiduciary duty on Fallon's part to expend funds for treatment explicitly excluded from the plan would be quite a stretch. This is not a case where Fallon promised without exclusion to cover any "appropriate" or "reasonable" procedure.

Thus, in all likelihood, the real problem confronting the Turners was not one of judicial remedies but a larger and more intractable one. It is a society-wide problem of when and how to provide last-chance health care for a courageous patient faced with a mortal disease who may have a small chance at survival if provided an expensive cutting edge treatment that she cannot afford out of her own resources. This is not the kind of problem to which courts can supply the solution.

Affirmed.

Concurrence follows.

HILL, *Senior Circuit Judge, specially concurring.* Appellant, recognizing that the statutory and case law compels the district court's grant of summary judgment to appellee, addresses entreaties to us which, if appropriate at all, are appropriate to the legislative branch.

Periodic accusations to the contrary notwithstanding, the courts are not legislative bodies.

I concur.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 5, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
95-40225-NMG

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff

v.

FALLON COMMUNITY HEALTH PLAN INC.,

Defendant

MEMORANDUM AND ORDER

Gorton, J.

The above-entitled action was filed on December 11, 1995 by the plaintiff, Ronald J. Turner ("Turner"), against the defendant, Fallon Community Health Plan, Inc. ("Fallon"), alleging *inter alia,* that Fallon's denial of Turner's rights and benefits due under Fallon's health care policy was arbitrary and capricious in violation of ERISA, 29 U.S.C. § 1001 *et seq.* Plaintiff invokes this Court's jurisdiction pursuant to 28 U.S.C. §1331.

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Pending before this Court are the following six motions:

1) defendant's motion for leave to file opposition to plaintiff's motion to amend his Complaint to add state law claims in excess of twenty pages filed July 12, 1996;

2) defendant's motion for leave of court to file memorandum of points and authorities in support of its motion for summary judgment in excess of twenty pages filed March 25, 1996;

3) defendant Is motion to strike the plaintiffs demand for a jury trial filed March 25, 1996;

4) plaintiffs motion for reconsideration of this Court's memorandum and order dated May 10, 1996 filed June 12, 1996;

5) plaintiff's motion to amend complaint to add state law claims filed June 12, 1996; and

6) defendant's motion for summary judgment filed March 25, 1996.

I. *FACTUAL BACKGROUND*

Turner, an employee of General Motors Corporation ("GM"), was appointed Administrator of the Estate of his wife, Charlotte Turner. Before she died, Mrs. Turner was entitled to receive covered health care benefits from Fallon through Turner's employment with GM.

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Mrs. Turner was diagnosed with breast cancer in 1991, and in May, 1993, tests revealed that her disease had metastasized. Dr. Ronald Hochman, Mrs. Turner's oncologist, determined that she required an autologous bone marrow transplant ("ABMT"), and recommended that she enroll in the bone marrow transplant program operated by the Dana Farber Cancer Institute ("Dana Farber").[1] In June, 1993, Dana Farber determined that Mrs Turner's cancer had spread to her bone marrow, and that as a result, she did not meet the requirements for eligibility in the their program.

The Dana Farber physicians and Dr. Hochman then recommended that Mrs. Turner enroll in the bone marrow transplant program operated by the Duke University Medical Center ("Duke"). On July 19, 1993, Duke, after analyzing the results of medical tests, determined that Mrs. Turner met the requirements for eligibility in the Duke program.

Before August 23, 1993, the Fallon Handbook, upon which Fallon bases its medical coverage decisions, provided coverage for ABMT procedures, but only for treatment of "acute leukemia in remission, resistant non-Hodgkin's disease, recurrent or refractory neuroblastoma, or advanced Hodgkin's disease." The

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1. ABMT (also referred to as AuBMT) involves the extraction or "harvesting" of white blood cells from a patient's bone marrow. White blood cells, which are vital to the operation of the body's immune system, are removed in order to enable the patient to undergo high dose chemotherapy ("HDC") treatment which, ideally, destroys the cancer cells but also has the undesirable effect of destroying the white blood cells that remain in the body. After HDC, the patient's white blood cells are destroyed and the patient effectively has no immunity to disease. The previously harvested white blood cells then are transfused into the patient. Optimally, the white blood cells will multiply and revive the patient's immune system.

Handbook specifically excluded coverage for ". . . [s]ervices for any transplant or condition not listed above. This includes, but is not limited to bone marrow transplant for treatment of solid tumors or pancreas transplant."

In response to requests from Mrs. Turner and another patient of Dr. Hochman for coverage of ABMT procedures for solid tumor cancer, Fallon's Transplant Committee met on August 23, 1993, to review the respective protocols of the Dana Farber and Duke programs for the application of ABMT to solid tumor carcinoma. The Transplant Committee heard the medical opinions of Dr. Hochman and a Fallon surgical oncologist identified only as "Dr. Orr." The Transplant Committee also reviewed the then current literature on the use of ABMT in connection with solid cancer tumors.

Based upon the Transplant Committee's recommendation, Fallon extended coverage for ABMT to solid cancer tumors, but only in cases where 1) Dana Farber physicians determine that the patient meets Dana Farber's protocol criteria, and 2) the Fallon Transplant Committee determines that the patient has a critical need for the Dana Farber transplantation procedure and there is a strong likelihood of a successful clinical outcome for the particular patient. Mrs. Turner did not qualify for coverage under the amended Fallon Plan because she did not meet Dana Farber's protocol. Fallon ultimately denied her request for coverage for ABMT procedures to be performed by Duke and, after her final appeal for coverage under the Duke program was denied by Fallon, Mrs. Turner, on October 5, 1993, began chemotherapy treatment. Mrs. Turner died on August 17, 1994.

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II. *PROCEDURAL HISTORY*

Plaintiff filed a complaint in the Superior Court of Massachusetts, Worcester Division, on December 6, 1995, asserting claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium, and negligent and/or intentional infliction of emotional distress. The case was removed to this Court on December 11, 1995, whereafter plaintiff amended his complaint to state a single claim of ERISA violation. On March 29, 1996, the plaintiff filed a motion for a continuance or other relief pursuant to Fed. R. Civ P. 56(f) which this Court denied on May 10, 1995. Pending before this Court are the above referenced six motions all of which are ripe for disposition.

III. *DISCUSSION AND ANALYSIS*

A. *Defendant's Motions for Leave to File Memoranda in Excess of 20 Pages.*

Defendant's motion for leave to file opposition to plaintiff's motion to amend his-complaint to add state law claims in excess of twenty pages and defendant's motion for leave of court to file memorandum of points and authorities in support of defendant's motion for summary judgment in excess of twenty pages set forth reasons why Fallon should be granted leave to file extended briefs. Defendant states that the highly technical-subject matter, i.e. medical treatment and explanations of the processes involved, necessitate the submission of briefs in excess of twenty pages. This Court accepts the explanation and will therefore, allow both motions.

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B. *Defendant's Motion to Strike the Plaintiff's Demand for a Jury Trial*

This is an action brought pursuant to 29 U.S.C. §1132 to determine whether Fallon properly denied Mrs. Turner's claim for benefit overage under an ERISA plan.[2] To determine whether a jury trial is available under a particular statute, courts must first look at the statute itself and then to its legislative history.

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2. The civil enforcement provisions of ERISA are found in Section 502 of the Act, codified at 29 U.S.C. §1132. The pertinent provisions read:

> a) Persons empowered to bring civil action. A civil action may be brought . . .
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> 1) by a participant or beneficiary . . .
>
> B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
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> . . .
>
> 3) by a participant, beneficiary, or fiduciary A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
>
> B) to obtain other appropriate; equitable relief
>
> i) to redress such violations or
>
> ii) to enforce any provisions of this subchapter or the terms of the plan.

Charlton Memorial Hosp. v. The Foxboro Co., 818 F.Supp. 456, 459 (D.Mass.1993). ERISA does not explicitly state or provide that a person with the standing to assert an ERISA claim has a right to a jury trial with respect to that claim. *Fuller v. Connecticut Life Ins. Co.*, 733 F.Supp. 462, 463 (D.Mass.1990). Although the issue has not yet been addressed by the First Circuit Court of Appeals, this United States District Court has consistently held that there is no right to a jury trial under ERISA. *Vartanian v. Monsanto Co.*, 880 F.Supp. 63 (D.Mass.1995); *Jorstad v. Connecticut General Life Ins. Co.*, 844 F.Supp. 46 (D.Mass.1994); *Charlton Memorial Hosp.*, 818 F.Supp. at 460; *Fuller*, 733 F.Supp. at 465. A majority of Circuit Courts has likewise held that no right to a trial by jury exists with respect to a claim for benefits based upon ERISA. *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994), *cert. denied*, 115 S.Ct. 1699 (1995); *Houghton v. SIPCO, Inc.*, 38 F.3d 953 (8th Cir.1994); *Blake v. UnionMutual Stock Life Ins. Co. of America*, 906 F.2d 1525 (11th Cir.1990); *Turner v. CF&I Steel Corp.*, 770 F.2d 43, 47 (3d Cir.1985), *cert. denied*, 474 U.S. 1058 (1986); *Wardle v. Central States, S.E. and S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir.1980), *cert. denied*, 449 U.S. 1112 (1981). While sheer weight of opinion is not in itself sufficient reason for this Court to rule in a particular way, "it is often indicative that the road less traveled may be a dead end." *Fuller*, 733 F.Supp. at 463.

Most courts that have analyzed the legislative history of ERISA have concluded that a jury trial is not available under the statute. Those courts construe Congress' failure to provide such a right as conclusive evidence of an intent not to alter the common law of trusts under which no jury trial is available. *Wardle*, 627 F.2d at 830; *Fuller*, 733 F.Supp. at 463. The Supreme Court of the United States has found that:

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> ERISA abounds with the language and terminology of trust law. . . . ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 303, 110 (1988) (determining the appropriate standard of review in ERISA actions and quoting H.R. Rep. No. 93-533, p. 11 (1973)). In *Firestone*, the Court therefore, held that decisions under ERISA are to be "guided by principles of trust law." *Id.*

The Seventh Circuit Court of Appeals, after examination of ERISA's legislative history, specifically rejected the argument that the structure of ERISA evidences a congressional intent to provide for a jury trial. *Wardle*, 627 F.2d at 820. In *Wardle*, the plaintiff argued that because 29 U.S.C. §1132(a)(3) specifically authorizes participants to bring suit to enforce equitable rights, §1132 (a)(1)(B) must contemplate suits to enforce legal rights, which would entitle them to a jury trial. Otherwise, it was argued, that section would be superfluous. *Fuller*, 733 F.Supp. at 463 (citing *Wardle*, 627 F.2d at 828-29). The court in *Wardle* rejected the argument, however, reasoning that even if every claim brought under §1132(a)(1)(B) were equitable in nature, that section would not be superfluous because Congress granted to state courts concurrent jurisdiction over suits brought under that section but not under §1132(a)(3). *Wardle*, 627 F.2d at 829.

Because ERISA does not provide for a trial by jury and the majority of courts, within and without the First Circuit, have found no congressional intent to provide such a right, this Court concludes that the plaintiff is not entitled to a jury trial in this case.

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C. *Plaintiff's Motions for Reconsideration of This Court's Earlier Memorandum and Order and to Amend Complaint to Add State Law Claims*

In response to defendant's motion for summary judgment, the plaintiff filed a motion under Fed.R.Civ.P. 56(f) for a continuance so that he could conduct the necessary discovery to oppose defendant's motion. By a Memorandum and Order dated May 10, 1996, ("the Order"), this Court denied that motion. In doing so, it observed that plaintiff's attempts to defeat the motion would be futile because "ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute."

Turner now files this motion for reconsideration of the issue of preemption addressed by this Court in the Order. Consistent with this motion, Turner also has filed a motion to amend his complaint to reassert his state law claims. The crux of his argument in the latter motion is that this Court was incorrect in its conclusion of May 10, 1996 that "ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute." Plaintiff argues that Congress did not intend that ERISA would preempt state law claims where ERISA provides no remedy. In addition, he argues, ERISA does not preempt plaintiff's claims where, as here, the claim sounds in malpractice by the HMO rather than challenging a plan administration decision. Finally, Turner argues that this Court should fashion federal common law where, as here, ERISA does not provide an express remedy.

ERISA was enacted to provide a uniform set of federal regulations for dealing with employee benefit plans, the

regulation of which had previously been the province of various state laws. *See FMC Corp.* v. *Holiday*, 498 U.S. 52, 56-60 (1990). "The pre-emption clause [of ERISA] is conspicuous for its breadth." *Id.*, at 58. ERISA preempts all state laws that "relate to" employee benefit plans, whether or not the state laws are designed to affect employee benefit plans. *Id.*

In recent years, an increasing amount of state law actions have been brought against utilization review providers for the denial of claims for benefits. The majority rule that has developed is that such claims are preempted by ERISA, even where ERISA provides plaintiffs with no alternative remedy. Although the First Circuit Court of Appeals has yet to address this issue directly, in *Tolton v. American Biodyne, Inc.*, 48 F.3d 937 (6th Cir.1995), the Sixth Circuit specifically dealt with the question of whether ERISA preempted state law claims against a utilization review provider for wrongful death, improper refusal to authorize benefits, medical malpractice and insurance bad faith.

The plaintiff in *Tolton* was the administrator of the estate of Henry Tolton. Mr. Tolton had committed suicide and the plaintiff brought various state law claims against defendants alleging that the suicide resulted from defendant's refusal to authorize certain inpatient benefits under the employee benefits plan which covered Tolton. The defendants removed the case to federal district court on grounds of ERISA preemption, and then moved for summary judgment on the same grounds. The district court granted the defendant's motion for summary judgment and the plaintiff appealed.

Reviewing the decision of the district court *de novo*, the Sixth Circuit affirmed, holding that because plaintiff's claims

arose from the defendant's refusal to authorize psychiatric benefits to Tolton under the plan, and because there was no dispute that the health plan was covered by ERISA, the claims "clearly 'relat[ed] to' the benefit plan" and were therefore, preempted. *Id.*, at 942. The fact that Tolton was refused benefits pursuant to utilization review made no difference to the court, which explained that similar challenges to utilization review were found to be preempted in other circuits. *Id.* (relying on *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.) (ERISA preempted wrongful death claim against utilization review provider for refusal to authorize hospitalization for plaintiff who then lost her fetus), *cert. denied*, 113 S.Ct. 812 (1992), and also citing *Kuhl v. Lincoln Nat'l Health Plan*, 999 F.2d 298 (8th Cir.1993) (ERISA preempted wrongful death claim based upon delayed pre-authorization for surgery), *cert. denied*, 114 S.Ct. 694 (1994), and *Spain v. Aetna Life Ins. Co.*, 11 F.3d 129, 131 (9th Cir.1993) (ERISA preempted wrongful death claim based on withdrawal of authorization for surgery) *cert. denied*, 114 S.Ct. 1612 (1994)).

In its *Tolton* decision, the Sixth Circuit went on to cite additional reasons for its holding which are also informative with respect to the case at bar and plaintiff's arguments outlined above. The court rejected the plaintiff's argument, which is also made by the plaintiff here, that ERISA does not preempt its state law claims because ERISA provides no adequate alternative remedy. *Id.* at 943 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) An unfortunate consequence of ERISA preemption is, therefore, that plan beneficiaries or participants who bring certain kinds of state actions, e.g. wrongful death, may be left without a meaningful remedy. *Tolton*, 48 F3d at 943; *Corcoran*, 965 F.2d at 1338 ("The result ERISA compels us to reach means that the [plaintiffs] have no remedy, state or federal,

for what may have been a serious mistake."); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505 (10th Cir.1991) (no remedy for wrongful death action against ERISA health plan.); *Kuhl,* 999 F.2d at 298 (no remedy for plaintiff alleging husband's death resulted in delayed preauthorization for surgery.)

Sadly, the case at bar compels a like result. Plaintiff's state common law claims are preempted by the broadly sweeping arm of ERISA. Plaintiff is left without any meaningful remedy even if he were to establish that Fallon wrongfully refused to provide the Duke protocol treatment his wife urgently sought. Notwithstanding the merits of plaintiff's argument, this Court cannot legislate by judicial decree nor apply a statute, such as ERISA, other than as drafted by Congress.

The first step in this Court's analysis of plaintiff's claims is, therefore, to determine if the state laws under which he brings his claims against Fallon "relate to" GM's employee benefit plan. Plaintiff's state law claims as set forth in the proposed Second Amended Complaint include breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium and negligent and/or intentional infliction of emotional distress. Those claims all arise from Fallon's refusal to authorize the Duke protocol treatment for Mrs. Turner under the plan that GM had contracted with Fallon to provide for its employees. It is clear, therefore, that plaintiff's claims "relate to" the benefit plan. *Pilot Life*, 481 U.S. at 48; *Tolton,* 48 F.3d at 942.

D. *Defendant's Motion for Summary Judgment*

Because plaintiff's state common law claims outlined above are preempted by ERISA, he is left with only his claim under

ERISA. When pursuing a civil ERISA action, a claim may only be brought

> by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. §1132 (a)(1)(B). Here plaintiff is not seeking to recover benefits due to his wife under the terms of the Fallon Community Health Plan-which he was provided by his employer. Furthermore, any kind of injunctive relief to enforce Mrs. Turner's rights under the plan is no longer viable due to her unfortunate death.

The heart of plaintiff's ERISA claim is that Fallon's decision to deny Mrs. Turner coverage for treatment under the Duke protocol was arbitrary and capricious. This Court need not and will not, however, address the merits of that claim. The clear mandate of ERISA compels this Court to the unavoidable conclusion that plaintiff does not seek to recover benefits due to Mrs. Turner nor to clarify his rights to future benefits under the terms of his plan. Moreover, any rights Mrs. Turner may have once possessed under the plan are no longer viable. Finally, it is settled law that a claim for damages cannot fall under the purview of "other equitable relief" available to a successful ERISA litigant under §502(a)(3)(B)(i) thereof. *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063. Plaintiff does not have a justiciable claim against Fallon under ERISA and therefore summary judgment will, appropriately, be entered for defendant.

Whether plaintiff has other claims against other parties, as

suggested in defendant's opposition brief (which plaintiff may well have) is not an issue before this Court in these proceedings.

It is noted that utilization review mechanisms and procedures such as the HMO at issue in this case did not exist when Congress enacted ERISA in 1974. While the result in this case is consistent with the manifest intent of Congress neither to allow state law claims that "relate to" employee welfare benefit plans nor to afford a remedy under ERISA to beneficiaries in analogous situations to that of Mrs. Turner, the landscape of employee benefit plans has shifted dramatically in the past 23 years. The prevalent system of utilization review now in effect in most health care programs may warrant a reevaluation of ERISA by Congress so that its central purpose of protecting employees may be reconfirmed.

ORDER

For the foregoing reasons,

1) defendant's motion for leave to file opposition to plaintiff's motion to amend his complaint to add state law claims in excess of twenty pages, filed July 12, 1996, is **ALLOWED,**

2) defendant's motion leave of court to file memorandum of points and authorities in support of defendant's motion for summary judgment in excess of twenty pages, filed March 25, 1996, is **ALLOWED,**

3) defendant's motion to strike the plaintiff's demand for a jury trial, filed March 25, 1996, is **ALLOWED,**

4) plaintiff's motion for reconsideration of this Court's

memorandum and order dated May 10, 1996, filed June 12, 1996, is **DENIED,**

5) plaintiff's motion to amend complaint to add state law claims, filed June 12, 1996, is **DENIED,** and

6) defendant's motion for summary judgment, filed March 25, 1996 is **ALLOWED.**

So ordered.

s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: February 5, 1997

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED MARCH 10, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 95-40225-NMG

RONALD J. TURNER, AS ADMINISTRATOR OF THE ESTATE OF CHARLOTTE M. TURNER, AND INDIVIDUALLY,

Plaintiff

v.

FALLON COMMUNITY HEALTH PLAN, INC.

Defendant

MEMORANDUM AND ORDER

GORTON, J.

The plaintiff in the above-entitled matter, Ronald J. Turner ("Turner"), filed the instant action against defendant, Fallon Community Health Plan, Inc. ("Fallon"), alleging, *inter alia*, that defendant's denial of plaintiff's rights and benefits due under defendant's health care policy was arbitrary and capricious in violation of ERISA, 29 U.S.C. § 1001 *et seq.* Pending before this Court is plaintiff's motion filed pursuant to Fed. R. Civ. P. 56(f), for a continuance or other relief.

Appendix C

I. *FACTUAL BACKGROUND*

Turner, an employee of General Motors Corporation ("GM"), was appointed Administrator of the Estate of his wife, Charlotte Turner. Before she died, Mrs. Turner was entitled to receive covered health care benefits from Fallon through Turner's employment with GM.

Mrs. Turner was diagnosed with breast cancer in 1991, and in May, 1993, tests revealed that her disease had metastasized. Dr. Ronald Hochman, Mrs. Turner's oncologist, determined that Mrs. Turner required an autologous bone marrow transplant ("ABMT"), and recommended that she enroll in the bone marrow transplant program operated by the Dana Farber Cancer Institute ("Dana Farber") In June, 1993, Dana Farber determined that Mrs. Turner's cancer had spread to her bone marrow, and that as a result she did not meet the requirements for eligibility in the Dana Farber program.

The Dana Farber physicians and Dr. Hochman then recommended that Mrs. Turner enroll in the bone marrow transplant program operated by the Duke University Medical Center ("Duke"). On July 19, 1993, Duke, after analyzing the result of medical tests, determined that Mrs. Turner met the requirements for eligibility in the Duke program.

Before August 23, 1993, the Fallon Handbook, upon which Fallon bases its medical coverage decisions, provided coverage for ABMT procedures, but only for the treatment of "acute leukemia in remission, resistant non-Hodgkin's disease, recurrent or refractory neuroblastoma, or advanced Hodgkin's disease. The Handbook specifically excluded coverage for "[s]ervices for any transplant or condition not listed above. This

includes, but is not limited to bone marrow transplant for treatment of solid tumors or pancreas transplant."

In response to requests from Mrs. Turner and another patient of Dr. Hochman for coverage of ABMT procedures for solid tumor cancer, Fallon's Transplant Committee met on August 23, 1993, to review the respective protocols of the Dana Farber and Duke programs for the application of ABMT to solid tumor carcinoma. The Transplant Committee heard the medical opinions of Dr. Hochman and a Fallon surgical oncologist identified only as "Dr. Orr." The Transplant Committee also reviewed the then current literature on the use of ABMT in connection with solid cancer tumors.

Based upon the Transplant Committee's recommendation, Fallon extended coverage for ABMT to solid cancer tumors, but only in cases where (1) Dana Farber physicians determine that the patient meets Dana Farber's protocol criteria, and (2) the Fallon Transplant Committee determines that the patient has a critical need for the Dana Farber transplantation procedure and there is a strong likelihood of a successful clinical outcome for the particular patient.

Mrs. Turner did not qualify for coverage under the amended Fallon Plan, because she did not meet Dana Farber's protocol. Fallon ultimately denied Mrs. Turner's request for coverage for ABMT procedures to be performed by Duke. After her final appeal for coverage under the Duke program was denied by Fallon, Mrs. Turner, on October 5, 1993, began chemotherapy treatment. Sadly, Mrs. Turner died on August 17, 1994.

II. *PROCEDURAL HISTORY*

Plaintiff filed a complaint in the Superior Court of

Massachusetts, Worcester Division, on December 6, 1995, asserting claims of breach of contract, breach of implied covenant of good faith and fair dealing, wrongful death, loss of consortium, and negligent and/or-intentional infliction of emotional distress. The case was removed to this Court on December 11, 1995, whereafter plaintiff amended his complaint to state a single claim of ERISA violations. Fallon moved for summary judgment on March 25, 1996, and shortly thereafter, plaintiff responded by filing the instant motion for a continuance or other relief pursuant to Fed. R. Civ. P. 56(f). Turner opposes that motion.

III. DISCUSSION

A. *Applicable framework*

Fed. R. Civ. P. 56(f) states that

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

To obtain relief under Rule 56(f), plaintiff must (1) provide an authoritative proffer of the facts required to be discovered, (2) provide that proffer in a timely manner, (3) demonstrate good cause for his inability to adduce the facts essential to oppose the motion for summary judgment, (4) demonstrate the utility of the discovery, and (5) demonstrate the materiality of the facts.

See Resolution Trust Corp. v. North Bridge Associates. Inc., 22 F.3d 1198, 1203-07 (1st Cir. 1994). The First Circuit has stated that these requirements

> are not inflexible and that district courts are vested with considerable discretion in their administration. In the exercise of that discretion, one or more of the requirements may be relaxed, or even excused, to address the exigencies of a given case. When all five requirements are satisfied, however, a strong presumption arises in favor of relief. Unless the movant has been dilatory, or the court reasonably concludes that the motion is a stalling tactic or an exercise in futility, it should be treated liberally.

Id., at 1203 (citations omitted).

B. *Legal analysis*

Defendant does not dispute that plaintiff has made an authoritative proffer in a timely manner of the facts which plaintiff seeks to discover, so he must simply satisfy the final three prerequisites for relief under Rule 56(f) set forth in the *North Bridge Associates* decision.

1. *Good cause for plaintiff's inability to adduce the facts essential to oppose defendant's motion for summary judgment*

Plaintiff has the burden of showing good cause for his inability to adduce the facts essential to oppose defendant's motion for summary judgment in order to obtain a continuance under Rule 56(f). *See North Bridge Associates*, 22 F.3d at 1203-06; *Paterson-Leitch Co., Inc. v. Massachusetts Municipal*

Wholesale Elec. Co., 840 F.2d 985, 988 (1st Cir. 1988). Less than four months passed between plaintiff's filing of the complaint and defendant's filing of its motion for summary judgment. Plaintiff filed the pending Rule 56(f) motion promptly thereafter. He clearly has not been dilatory in his attempts to obtain discovery. Fallon has to date failed to ascertain whether the Handbook is the only instrument representing the employee welfare benefit plan purchased by GM from Fallon for the benefit of GM's employees. Given that this case is in its early stages, and that Fallon has been slow to comply with plaintiff's request for documents relating to the Fallon-GM plan, plaintiff has shown good cause why he cannot adduce the facts necessary to oppose defendant's motion for summary judgment.

2. *Utility of further discovery*

Plaintiff's requested discovery would be "useful" if it would suffice to raise a genuine issue of material fact and defeat summary judgment. *North Bridge Associates*, 22 F.3d at 1206. When pursuing a civil ERISA action, a claim may only be brought "by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). In the instant case, plaintiff is not seeking to recover benefits due to Mrs. Turner under the plan, and injunctive relief to enforce Mrs. Turner's rights under the plan is no longer viable. Plaintiff has therefore failed to demonstrate that his requested discovery would suffice to raise a genuine issue of material fact.

3. *Materiality of further discovery*

The threshold of materiality for Rule 56(f) is low. *North*

Bridge Associates, 22 F.3d at 1207. The kind of discovery plaintiff may conduct under Rule 56(f) is more restricted than the discovery he would be permitted to pursue during the ordinary discovery process. *See id.* The facts that plaintiff seeks to discover must be capable of "breathing life into his claim or defense." *Id.*

In the instant case, even if plaintiff discovers evidence demonstrating unequivocally that defendant's decision to deny coverage to Mrs. Turner was arbitrary and capricious, that evidence would not breathe life into his ERISA claim. Plaintiff is not seeking to recover benefits due to Mrs. Turner under the terms of his plan and, unfortunately, any rights she may have once possessed thereunder can no longer be enforced. Nor is plaintiff seeking to clarify his rights to future benefits under the terms of the plan. He clearly does not have a justiciable ERISA claim against Fallon, and therefore any discovery requested by plaintiff is immaterial. Whether plaintiff has other claims against other parties (which he may well have) is not an issue before this Court in these proceedings.

IV. CONCLUSION

This Court concludes that ERISA preempts any claim plaintiff could raise against Fallon, and that Mrs. Turner's death has effectively eliminated any chance of recovery under that statute. Although this result may appear unfair and is obviously frustrating to plaintiff, Congress afforded no remedy under ERISA to a participant for a violation by a plan administrator that may have contributed to the death of a beneficiary. This Court is bound by the statute and by the First Circuit's holding in *North Bridge Associates*. Plaintiff's ERISA claim is an exercise in futility, and this Court will therefore strictly apply

the Rule 56(f) requirements as set forth by the First Circuit in that case. Because plaintiff cannot show the utility or materiality of the discovery he seeks, plaintiff's Rule 56(f) motion is DENIED.

SO ORDERED.

s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: May 10, 1996

APPENDIX D — RELEVANT STATUTES

29 U.S.C. § 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for, appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise' provided in subsection (b) of this

section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), or' (5) of (c) of this section or under subsection (i) or (1) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section. 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of thin title. (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this subtitle or the terms' of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

Appendix D

29 U.S.C. § 1144

§ 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.